Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR
CLERK

No. 86-1661

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

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BATTLES FARM COMPANY, et al.,

Petitioners,

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# REPLY BRIEF IN SUPPORT OF PETITION

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Petitioners Battles Farm Company et al. respectfully submit this brief in reply to the opposition filed by the Solicitor General to the grant of their certiorari petition.

## ARGUMENT

This case cries out for review by this Court.

### I

Contrary to the Solicitor General's assertion (Opp. at 9), the court below most certainly did hold that "the government's 'substantially justified' position with respect to one claim mandates denial of fees where the government's position with respect to another [related] claim is not so justified." The district court ruled that the government's position on "the central issue" in this litigation -- whether HUD was required to pay operating subsidies from the excess rental reserve fund -- lacked substantial justification "because (1) HUD's position had no reasonable basis, (2) was consistently

rejected by the courts, and (3) was ultimately abandoned by HUD." App. at 21a. The court of appeals expressly did not decide that this ruling was erroneous (see App. at 8a-9a) and thus necessarily held that substantial justification on the contract theory immunized the government from legal fees under the EAJA regardless of the lack of substantial justification on the reserve fund theory.

It is difficult to imagine a decision more at odds with the congressional objectives in enacting the EAJA, especially when the reserve fund theory was the central issue in the case. The EAJA was adopted to deter the government from taking unreasonable positions. Yet the decision below affirmatively encourages the government to do exactly that, contrary to Spencer

v. NLRB, 712 F.2d 539, 556-57 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984), and Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983).

The Solicitor General attempts to justify this perverse result on the sophistic notion that the government's position on the reserve fund claim somehow was necessary or appropriate to bolster a reasonable position on the contract claim. Apart from having no factual foundation whatever (see Pet. at 9-11), this argument makes no sense. Parties do not advance their cause on one issue by pursuing an unjustified position on another, and certainly the Congress that enacted the EAJA never could have intended to permit the government even to try.

Finally, the Solicitor General accuses us (Opp. at 8 n.) of "selective quotation" in suggesting that the same rationale on which the government sought certiorari in Underwood applies here. We stand by our suggestion, and submit that, if anything, this case warrants review more than Underwood. In Underwood the Solicitor General invites this Court to consider the justification for the government's position when it succeeds in obtaining certiorari and a stay from this Court on the very issue on which the lower courts have consistently ruled against it -- a circumstance that is likely to arise infrequently, if ever again. In contrast, we ask the Court to hear an issue that will arise every time related multiple issues are litigated -- a circumstance that probably is the norm and not the exception.

II

In this case, the courts found, and the parties now are in agreement, that the plaintiffs' reserve fund and contract claims were related in the sense that they constituted nonfractionable alternative requests for relief. In fact, to quote the district court, "much of counsel's time [was] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." App. at 27a (internal quotations omitted).

In these circumstances, when the government, as here, takes an unreasonable position on one claim, but a reasonable position on another, by definition it is impossible to award fees according to an apportionment of counsel's time actually incurred on the

first claim. The only choice is either (1) to deny fees entirely, (2) to apportion fees on some mechanical formula, or (3) to award fees according to the overall results achieved on the claim against which the government unjustifiably defended. The court of appeals opted for the first choice, despite the fact that that vitiates the whole point of the EAJA. Following Hensley v. Eckerhart, 461 U.S. 424 (1983), the district court adopted the third. We submit that the district court was correct, and that this case merits review to settle the applicability of Hensley to EAJA awards.

III

The circuits undeniably are in conflict regarding the appropriate standard of review for "substantial

justification" issues. Indeed, the courts of appeals in Dubose and Battles Farm, applying the de novo standard of review, reversed the district court award of fees; the court of appeals in Underwood, applying the abuse of discretion standard, affirmed the fee award.

Furthermore, the de novo standard followed by the court below is calculated only to turn the award of fees under the EAJA into a lengthy, socially unproductive second litigation. More than that, it in practice defeats the objectives of the EAJA by forcing fee applicants to run a gauntlet of review that they cannot afford because of the limit on fee recovery. As explained in our petition (at 25-26), the EAJA generally limits hourly fees to $75.

Indeed, the government maintains that the EAJA does not compensate litigants at all for time spent in opposing reasonable positions by the government on fee issues. At any rate, by requiring parties in effect to win twice while they cannot possibly obtain full compensation for doing so, the de novo standard deters prosecution of valid EAJA applications.

The D.C. Circuit purports to justify the de novo standard on the ground that it will promote consistency of results under the statute. See Spencer v. NLRB, supra, 712 F.2d at 563-64. There is a greater need, however, for quick and final disposition of fee requests than for more uniformity in results. The issue under review, after all, is not whether the government erred in its position, a matter already

properly settled by the litigation on the merits. The issue instead is how badly it erred -- a question, we suggest, that the district judge may be in a better position than the court of appeals to assess and one, in any event, that does not merit a second, extended litigation and is adequately reviewed under an "abuse-of-discretion" test.

IV

At a minimum, if the Battles Farm certiorari petition is not granted now, this case should be held pending disposition of Underwood and Dubose. The Court already has granted certiorari in Underwood, which puts into question the meaning of the EAJA's "substantial justification" test. Moreover, Dubose also raises the same standard-of-review issue as Battles Farm.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1987